UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BOARD OF TRUSTEES OF THE SOUTHERN CALIFORNIA IBEW-NECA DEFINED CONTRIBUTION PLAN,

Plaintiff,

v.

THE BANK OF NEW YORK MELLON CORPORATION, et al.,

Defendants.

09-CV-6273 (RMB)

ECF Case

Contains Confidential Information

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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"IBEW" means plaintiff the Board of Trustees of the Southern California IBEW-NECA Defined Contribution Plan.

"McMorgan" means McMorgan & Company, an investment manager that managed pension assets for the Southern California IBEW-NECA Pension Plan, which was overseen by IBEW.

"NALC" means the National Association of Letter Carriers.

"Pl.'s Br." means Plaintiff's Motion and incorporated Memorandum of Law in Support of Class Certification, filed on January 31, 2012.

"Pl.'s Opp. Mem. to Def.'s Mot. for SJ Recons." means Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Reconsideration of Order Denying Summary Judgment, filed on February 9, 2012.

"Pl.'s SJ Opp." means Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, filed on July 25, 2012.

"Program" means the securities lending program operated by the Bank of New York Mellon.

"SMA" means separately managed account.

"WAMCO" means Western Asset Management Company, an investment manager that managed pension assets for the Southern California IBEW-NECA Defined Contribution Plan, which was overseen by IBEW.

PRELIMINARY STATEMENT

A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).[1] "What matters to class certification … is not the raising of common questions—even in droves—but, rather, the capacity of a classwide proceeding to generate common ***answers*** apt to drive the resolution of the litigation." *Id.* at 2551 (original emphasis). To generate the requisite "common answers," a common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Here, a "one stroke" resolution is not possible—and class certification must be denied—because proving BNY Mellon's liability requires evidence unique to each class member, including each putative class member's individualized investment guidelines, risk tolerances, investment portfolios, and communications with BNY Mellon.

[redacted]

[1] All internal citations omitted and all emphases supplied unless stated to the contrary.

[redacted]

[redacted]

Class certification is precluded not just by the variation among the investment ***guidelines*** of each putative class member, but also by the different compositions of their respective investment ***portfolios***. [redacted]

[redacted]

For all of these reasons, the Court should deny IBEW's motion.

STANDARD FOR CLASS CERTIFICATION

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . ." *Wal-Mart*, 131 S. Ct. at 2551. The Second Circuit has made clear that a plaintiff seeking certification must provide "enough evidence, by affidavits, documents or testimony, to [satisfy the Court] that each Rule 23 requirement has been met." *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). Thus, IBEW bears the heavy burden of producing evidence proving that all of the requirements of Rule 23(a) and (b)(3) are satisfied. Rule 23(a) requires an analysis of four elements that are preconditions to class certification: numerosity, commonality, typicality, and adequacy of the named parties to represent the class. If all four requirements are satisfied, the Court must then look to the relevant category of class action under Rule 23(b) for additional prerequisites to certify a class. Here, IBEW seeks certification solely under Rule 23(b)(3), which provides that a class may be maintained only where "questions of law or fact common to class members predominate over any questions affecting only individual members," and where a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." As demonstrated below, IBEW has failed to meet its burden under both Rule 23(a) and 23(b)(3).

ARGUMENT

I. CLASS CERTIFICATION SHOULD BE DENIED BECAUSE INDIVIDUAL ISSUES PREDOMINATE OVER COMMON ISSUES SUCH THAT A "ONE STROKE" RESOLUTION OF CLASS CLAIMS IS NOT POSSIBLE.

In order to certify a class pursuant to Rule 23(b)(3), the Court must find that IBEW has proven that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To demonstrate predominance, IBEW must show that resolution of its—and each of the putative class members'—claims can be adjudicated on the basis of class-wide evidence without reliance on the individual facts and circumstances of each putative class member. *See, e.g.*, *Buetow v. A.L.S. Enters., Inc.*, 259 F.R.D. 187, 190 (D. Minn. 2009) ("a claim will meet the predominance requirement when generalized evidence proves or disproves the elements of the claim on a class-wide basis, because [s]uch proof obviates the need to examine each class member's individual position.").

Here, class-wide resolution is not possible because, by IBEW's own admission, facts specific to each putative class member—such as its risk tolerance, its earnings expectations, the makeup of its investment portfolio, and its communications with BNY Mellon—are outcome-determinative to the imprudence analysis.

A. IBEW Admits That A Prudence Analysis Requires Consideration Of An Investor's Risk Tolerance And Investment Aims.

[redacted]

[redacted]

B. The Variation Among Putative Class Members' Earning Expectations And Risk Tolerances Precludes Certification.

[redacted]

[redacted]

[redacted]

[redacted]

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[2] "Ex. __" followed by a number refers to exhibits to the Declaration of Vincent Y. Liu, dated March 1, 2012, submitted herewith.

[redacted]

[redacted]

1. Significant variation among putative class members' stated investment objectives precludes certification.

[redacted]

[redacted]

2. The significant variation among the putative class members' approved and prohibited investments is an additional bar to class certification.

[redacted]

[redacted]

[redacted]

C. Variation In Each Putative Class Member's Investment Portfolio Precludes Certification.

As discussed above, putative class members could elect to have their investments managed in an SMA or in a pooled fund. Each SMA and each pooled fund had individual guidelines and individual investment portfolios that reflected those guidelines. The differences among the portfolio composition of the putative class members' accounts preclude class certification because the resolution of the claims in this case requires an examination of not only each individual putative class member's Lehman investments, but also the entire investment portfolio of each putative class member. This point is highlighted by IBEW's claim that BNY

Mellon failed to adequately diversify the holdings in IBEW's account.

1. Resolution of IBEW's diversification claim requires individual portfolio analysis and cannot be performed on a class-wide basis.

[redacted]

[redacted]

2. Resolution of IBEW's prudence claim requires a portfolio-based analysis that cannot be performed on a class-wide basis.

In resolving a claim challenging the prudence of an individual investment, the fact finder is required to examine not only the challenged investment but also the way in which that investment fits into the overall portfolio. *See Laborers Nat'l Pension Fund v. N. Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 317 (5th Cir. 1999) ("the fiduciary shall be required to act as a prudent investment manager under the modern portfolio theory," meaning that alleged improduce is determined on an overall portfolio basis, not an investment-by-investment basis).

[redacted]

D. Variation In Each Putative Class Members' Communications With BNY Mellon Precludes Certification.

[redacted]

[redacted]

[redacted]

[redacted]

II. IBEW FAILS TO ESTABLISH THAT JOINDER IS IMPRACTICABLE.

Class certification must be denied where a plaintiff fails to meet Rule 23(a)(1)'s "requirement that 'the class is so numerous that joinder of all members is impracticable.'" *Block v. First Blood Assocs.*, 125 F.R.D. 39, 42 (S.D.N.Y. 1989). "Although the court may make common sense assumptions to support a finding of numerosity, it cannot do so on the basis of pure speculation without any factual support." *Kapiti v. Kelly*, 2008 WL 3874310, at *4 (S.D.N.Y. Aug. 18, 2008) (Berman, J.). Here, IBEW fails to prove numerosity because its Exhibit E is overly broad and includes numerous entities that do not fit within the proposed class definition and/or that IBEW has no standing to represent.

A. IBEW's Proposed Class Members Include Many Entities That Are Not ERISA-Governed Plans.

IBEW seeks to certify a class of "ERISA-governed plans." Pl.'s Br. at 1. [redacted]

[redacted]

[redacted]

B. IBEW Lacks Standing To Represent Any Putative Class Members That Did Not Invest In The Specific Lehman Note Held By IBEW.

It is axiomatic that a plaintiff must satisfy "the irreducible constitutional minimum of standing" to bring a claim in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, a plaintiff must establish, *inter alia*, an injury-in-fact. *See id.* at 560-61. Moreover, standing must be resolved before a class can be certified. *See Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 714 F. Supp. 2d 475, 480-81 (S.D.N.Y. 2010) ("Standing therefore is a threshold question—antecedent to class certification—that requires plaintiffs to have been personally injured, and plaintiffs thus have no standing to assert claims in relation to 'funds in which [plaintiffs] did not personally invest.'") (citing *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 532 (S.D.N.Y. 2008)); *see also In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 607 (S.D.N.Y. 2006) ("the Article III standing determination should precede that of class certification").[5]

[redacted]

[5] While in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), in which the Court addressed class certification before standing, subsequent cases held these two cases "to be *sui generis,* involving global mass tort settlements in distinct and unique procedural postures." These decisions would not apply here. *See In re Salomon Smith Barney*, 441 F. Supp. 2d at 606; *see also In re AllianceBernstein Mut. Fund Excessive Fee Litig.*, 2005 WL 2677753, at *9 (S.D.N.Y. Oct. 19, 2005) ("The [Supreme] Court has stressed that [the *Ortiz*] exception should only be applied when a court is confronted with an extremely complex case defying customary judicial administration.").

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[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

A plaintiff only has standing to bring claims based upon investments it actually owned. In *In re Lehman Bros. Secs. & ERISA Litig.*, 684 F. Supp. 2d 485 (S.D.N.Y. 2010), *aff'd* 650 F.3d 167 (2d Cir. 2011) ("*In re Lehman*"), the plaintiff attempted to bring claims on certain certificates in 94 separate offerings. *Id.* at 490. Judge Kaplan, noting that "plaintiffs have purchased in nine of the ninety-four offerings" and have suffered no "personal injury stemming from the other eighty-five," held that they "have no standing to assert those claims." *Id.* at 491.

Similarly, *New Jersey Carpenters Health Fund v. Residential Capital, LLC* held that the plaintiffs had no standing to bring claims concerning "the fifty-five offerings that they did not purchase." 2010 WL 1257528, at *4 (S.D.N.Y. Mar. 31, 2010). The court acknowledged that the relevant loans underlying the different offerings "might have similar defects" but nevertheless "are not actually the same." *Id.* Plaintiffs' claims "with regard to the offerings they did not purchase" were thus "dismissed for lack of standing." *Id.* at *8.[6]

That a case is brought as a putative class action "adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). "It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Rather, ***each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim***." *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987); *see also Pub. Emps.' Ret. Sys. of Miss.*, 714 F. Supp. 2d at 480-81 (S.D.N.Y. 2010) ("plaintiffs thus have no standing to assert claims in relation to funds in which [plaintiffs] did not personally invest.").

For this reason, courts have held that in "conducting the lawsuit on behalf of all class members and all those who have brought complaints that have been consolidated under their leadership, ***Lead Plaintiffs have a responsibility to identify and include named plaintiffs*** who have standing to represent the various potential subclasses of plaintiff who may be determined, at the class certification stage, to have distinct interests or claims." *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 2010 WL 3239430, at *4 (S.D.N.Y. Aug. 17, 2010); *see also King County, Wash. v. IKB Deutsche Industriebank AG*, 2010 WL 2010943, at *1 (S.D.N.Y. May 18, 2010) ("Where multiple claims are brought, at least one ***named*** plaintiff must have standing to pursue each claim alleged."). Here, IBEW failed its responsibility to "identify and include ***named plaintiffs***" that suffered injuries from investments in either the non-IBEW notes or the pooled funds managed by BNY Mellon.

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[6] That *In re Lehman* and *N.J. Carpenters* involved securities claims does not undermine their relevance here. Both cases premised their dismissal on Article III standing. Article III standing transcend individual statutes because "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 200 (2d Cir. 2005) (quoting *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997)).

[redacted]

[redacted]

[7] *See also N.J. Carpenters Health Fund*, 2010 WL 1257528, at *4 (loans underlying different offerings "might have similar defects" but this does not confer standing on plaintiffs for offerings they did not buy); *Pub. Emps.' Ret. Sys. of Miss.*, 714 F. Supp. 2d at 481 ("because the named plaintiffs only purchased securities in nineteen offerings, any claim based on the other sixty-five offerings must be dismissed with prejudice"); *In re Morgan Stanley*, 2010 WL 3239430, at *4-5 (because "WVIMB only alleged that it had purchased certificates from 2007–11AR," it "lacks standing to pursue its claims concerning any certificates other than 2007–11AR"); *King County*, 2010 WL 2010943, at *2 ("Because no named plaintiff purchased the European Commercial Paper, all claims based upon the purchase of those Notes are dismissed"). [redacted]

[redacted]

C. [redacted] Is Not Sufficiently Numerous That Joinder Is Impracticable.

The Second Circuit held that a prospective class of forty or more raises a presumption of numerosity. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). [redacted] fails to meet the numerosity requirement of Rule 23(a)(1). *Block*, 125 F.R.D. at 42 (24 to 57 insufficient when class members were easily identifiable and had financial resources and a stake to litigate); *Barninger v. Nat'l Mar. Union*, 372 F. Supp. 908, 912 (S.D.N.Y. 1974) (15 to 18 insufficient); *Lang v. Kan. City Power & Light Co.*, 199 F.R.D. 640, 646 (W.D. Mo. 2001) (16 insufficient).

III. CLASS TREATMENT IS NOT SUPERIOR.

In order for this Court to grant certification, IBEW must establish "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). [redacted] *See Kottler v. Deutsche Bank AG*, 2010 WL 1221809, at *5 (S.D.N.Y. Mar. 29, 2010) (citing *Becnel v. KPMG LLP*, 229 F.R.D. 592, 598 (W.D. Ark. 2005) (denying certification for failure to satisfy the superiority requirement since (i) myriad individual suits were filed by the putative class; (ii) the putative class included wealthy investors who were financially able to prosecute their own individual claims; and (iii) the damages of individual class members were significant)).

[redacted]

[redacted]

ERISA's fee-shifting provision further supports the conclusion that individual litigations are superior. *See* ERISA § 502(g). Courts have held that "a class action is not warranted" when "individual class members have an interest in prosecuting their own actions because of the availability of significant money damages and full reimbursement of" attorney's fees. *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 549-50 (D.N.J. 2001); *see also Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 291 (E.D. Tex. 2000) ("the availability of attorney's fees eliminate[s] financial barriers that might make individual lawsuits unlikely or infeasible").

Plaintiff cannot establish that class treatment is superior under these circumstances. The record demonstrates that any claims by the members of IBEW's proposed class of institutional investors should be adjudicated on an individual rather than a class basis.

IV. IBEW'S RELIANCE ON *AFTRA* IS MISPLACED.

IBEW repeatedly cites to *AFTRA* in an effort to convince the Court that the certification decision in that case is relevant here. It is not. Even assuming that the *AFTRA* court did not abuse its discretion by certifying a class, that case differs from this one in two critical respects.[9]

[redacted]

[9] *AFTRA* is irrelevant for reasons stated here and is not binding authority on this Court.

[redacted]

[redacted]

V. THE COURT SHOULD STRIKE GEOFFREY P. MILLER'S OPINION, AS IT USURPS THE COURT'S PROVINCE BY OFFERING LEGAL CONCLUSIONS.

In support of its class certification motion, IBEW submitted a declaration by Geoffrey P. Miller, a law professor at New York University. *See* Pl.'s Br. Ex. A ("Miller Decl."). The Court should exclude Professor Miller's report and proposed testimony because he offers legal conclusions, including on how the court should rule on ultimate issues.

Professor Miller summarized his opinion as follows:

[redacted]

[redacted] Other than form, the Miller Declaration is substantively indistinguishable from a legal brief. This is not proper expert testimony. It is simply a law professor providing a legal opinion as to what he believes is the appropriate outcome of this motion.

The law is clear that such testimony is improper and should be excluded. *See In re Fresh Del Monte Pineapples Antitrust Litig.*, 2009 WL 3241401, at *17 (S.D.N.Y. Sep. 30, 2009) (Berman, J.), *aff'd* 407 F. App'x 520 (2d Cir. 2010) (legal conclusions "respectfully lie outside Dr. Cotterill's expertise and would appear to usurp the role of the jury"); *see also United States v. Duncan*, 42 F.3d 97, 101 (2d Cir.1994) (Second Circuit "requires the exclusion of testimony which states a legal conclusion"); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) ("This circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion.") (citing cases). Courts in this Circuit have voiced a stern warning against such a practice: "to make it abundantly clear for the parties, it is axiomatic that ***an expert is not permitted to provide legal opinions, legal conclusions, or interpret legal terms***; those roles fall solely within the province of the court." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 470 (S.D.N.Y. 2005) (quoting *Roundout Valley Cent. Sch. Dist. v. Coneco Corp.,* 321 F. Supp. 2d 469, 480 (N.D.N.Y. 2004)).

The prohibition against permitting experts to provide testimony on matters of domestic law is rooted in Fed. R. Evid. 702, which specifies that expert testimony must be able to "help the trier of fact to understand the evidence or to determine a fact in issue." "Expert testimony that consists of legal conclusions cannot properly assist the trier of fact in either respect." *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997). "Notably, the rule makes no exception for situations in which the judge is the trier of fact, such as class certification." *Woodward v. Andrus*, 2009 WL 140527, at *1-2 (W.D. La. Jan. 20, 2009).

CONCLUSION

For the foregoing reasons, IBEW's Motion should be denied.

Dated: March 1, 2012
New York, New York

Respectfully submitted,

/s/

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